BEFORE ARBITRATOR JIM NICHOLSON

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,UNIT 09 PROFFESIONAL NURSES Union, and STATE OF HAWAII,DEPARTMENT OF HEALTH,..... Employer.	) GRIEVANCE OF .....))))))))))))

ARBITRATION DECISION AND AWARD

The undersigned Arbitrator was selected by the parties to arbitrate the above-captioned grievance. A pre-hearing conference was held on August 10, 1998. The arbitration was held on December 9,10 and 11, 1998 at the .....

James E. Halvorson, Esq., represented the ....., Department of Health, State of Hawaii, ("Employer, State, ..."). Peter Liholiho Trask, Esq., represented the Hawaii Government Employees Association, AFSCME, Local 152, AFLCIO (Union) and Grievant ....., (Grievant). Donna N. Baba & Associates preserved the hearing record of the case.

Both parties stipulated that this matter is properly before the Arbitrator. Full opportunity was afforded the parties to present evidence, examine, and cross-examine witnesses and to present final arguments through post hearing briefs. Representatives were found to fully, fairly, and competently present and represent the respective positions of their clients.

FACTS

This grievance involves the ten-day suspension of Grievant, effective ....., for allegedly secluding a patient at ..... in an unauthorized area without obtaining an order from the doctor and failing to complete the required documents in accordance with the hospital's policies and procedures.

At the time of the suspension, Grievant was a licensed Registered Professional Nurse III (RN III), who has been employed at ..... since ..... He had graduated from nursing school and received his diploma in .....

..... is monitored by the United States Department of Justice to ensure compliance with contempt orders as a result of a class action suit initiated in 1991. Pursuant to this monitoring, the Investigations Division of the State Department of the Attorney General has assigned investigators to

..... whose primary duty is to investigate allegations of patient abuse. To ensure that patients at the facility have access to these investigators, the facility is required by the Department of Justice to post the pictures of investigators throughout the facility. The investigators used what once a barber shop on the hospital premises as their office. ..... was one of the investigators assigned to the hospital. He spent at least three out of his five-day workweek at the hospital.

On ....., a patient by the name of ..... approached investigator .... complained to investigator ..... that during the evening of ....., at approximately 9:30 p.m. Grievant had physically "dragged" her to her room and physically prevented her from leaving her room without a seclusion order.

That same day, investigator ..... completed a Patient Event Report and submitted it to the risk management office at the facility. Subsequently, investigator ..... was assigned by his supervisor to conduct an investigation into ..... complaint. Investigator ..... conducted the investigation and completed it on ....., the investigation was submitted to the Patient Protection Committee through the risk management office.

Investigator ..... found the following relating to Grievant:

1. On ....., at approximately 2130 hours, multiple staff confirmed they witnessed Grievant had used unnecessary excessive physical force and dragged ..... into her room.

2. On ....., at approximately 2130-2155 hours, multiple staff confirmed they witnessed Grievant prevent ..... from exiting her room by blocking the door with his foot.

3. On ....., approximately at 2130-2155 hours, multiple staff confirmed ..... [Charge nurse] was present when Grievant prevented ..... from exiting her room by blocking the door with his foot.

4. ..... and Grievant stated ..... was offered to voluntarily go to her room.

5. ..... Kardex, dated ....., 1500 - 2300 shift disclosed ..... "was told to go to [stay in] her room."

6. No Patient Event Report was filed by ..... or Grievant regarding this incident.

8. Progress Notes, entry date ...../0800 hours, confirmed ..... filed a Patient Grievance Form and placed it in the designated grievance box. This was confirmed by RN ..... and RN .....

11. ..... [RN .....] stated Grievant told her that "This is the way things are done on my shift, when you go to nights they do things differently than on this shift. This is a common occurrence with ..... that she misbehaves in this manner frequently ... it not necessary to call a doctor and get an order . . . it would be too much paper work to get a seclusion order." ..... also stated during this time, Grievant was "pointing to a badge" attached to his shirt that explained the proper seclusion procedures.

Investigator ..... determined that patient abuse was substantiated. Although he did not interview all possible

witnesses ..... determined that there was a preponderance of evidence to support Employer's burden of proof. ..... defined preponderance as fifty percent plus one. He determined that in addition to the complainant, the following staff members confirmed all or a portion of the allegations against Grievant: RN ..... ("....."); Para-Medical Assistant ("PMA") ..... ("....."); PMA ..... ("....."); and PMA ..... (".....").

..... has a policy and procedure number 04.250.003 governing the use of seclusion and bodily restraint which defines seclusion as follows:

> Simultaneous confinement and isolation of the patient. Seclusion occurs whenever a patient is placed alone in an isolated room or enclosed space and the exit from the room is mechanically prevented by physical intervention by the staff.

Additionally, seclusion cannot occur in the patient's room. Seclusion must occur only in a designated seclusion room.

..... also has a policy and procedure governing patient abuse numbered 14.005.007.

Seclusion in a psychiatric setting is to be used as a last resort and is strictly controlled.

On ....., the Administrator, ..., requested investigator ..... to conduct an additional investigation, which was done, and he reported back to the

Administrator on ..... In a letter dated ....., the Administrator, ..., forwarded the investigative report to the Director, Department of Health, with a recommendation for dismissal of the Grievant. In arriving at this recommendation, the Administrator determined that there was just and proper cause for disciplinary action and used the seven part just cause checklist in arriving at this determination.

On ....., Grievant was advised, in writing, by letter from Lawrence Miike,("Miike") Director, Department of Health, State of Hawaii, that he was being dismissed from his position, number 12035, Registered Professional Nurse III, effective the close of business on ....., for an incident which occurred on ....., in ..... at approximately 2130.

According to Miike, Grievant was found to have (1) abused patient (.....), (2) placed her in seclusion in an unauthorized area, (3) did not obtain an order from the doctor on duty to place her in seclusion; and (4) failed to complete the required documents in accordance with the hospital's policies and procedures. In addition Grievant was alleged to have used "unnecessary and excessive force" in grabbing the patient by her two arms and "dragging" her into her room, then secluded and restrained her from leaving her own room.

A pre-dismissal meeting was held on ..... On ....., Miike, advised Grievant, in writing, that as a result of the pre-dismissal meeting of ....., he was extending Grievant's dismissal date from ..... to the close of business .....

Following this meeting, the Director ordered follow up on several issues raised by Grievant. ..... (".....") conducted a follow up investigation. As a result of this additional investigation, Grievant's punishment was reduced from a dismissal to a ten-day suspension. .....'s follow up interviews confirmed that two staff members ..... and ..... observed Grievant block the door of .....

Union filed a step 2 grievance dated October 30, 1997, on behalf of the Grievant. A step 2 meeting on October 30, 1997 was held and the Grievant produced additional matters he wished considered. ..... conducted the step 2 meeting and conducted the follow up on the issues raised by Grievant. The step 2 response dated November 7, 1997, denied the grievance. Union submitted a step 3 appeal dated November 18, 1997.

..... (".....") Labor Relations Division, Department of Human Resources Development adjudicated the step 3 appeal. In preparation for the step 3 meeting, ... reviewed the matters already raised below and conducted additional inquiry.

A step 3 meeting was held on November 25, 1997, at which time the Grievant presented additional material. These additional materials included statements of support for the Grievant signed by several of the staff witnesses who had made prior statements against him. Following the meeting the Grievant submitted additional material by FAX.

..... conducted additional interviews of six of the witnesses and she confirmed the following staff members saw the Grievant with his foot against .....'s door: .....; .....; .....; and ..... (".....). Two of these staff members confirmed their initial statements against the Grievant even though the Grievant had obtained their signatures of support.

Employer concluded that Grievant prevented ..... from exiting her room when he blocked the door with his foot.

On December 8, 1997, the Employer, by and through the Director of the Department of Human Resources Development, James Takushi, rendered its Step 3 decision sustaining the ten day suspension.

On December 15, 1997, the Union, by and through Business Agent, ..., notified the Employer of the Union's intent to arbitrate the grievance of Grievant.

ISSUES

Whether the ten-day suspension was for just and proper cause and if not, what is the appropriate remedy?

RELEVANT SECTIONS OF THE UNIT 09 AGRERMENT

ARTICLE 11 - DISCIPLINE

A. Employees shall be subject to discipline by the Employer for just and proper cause. Such Employees who are disciplined shall be furnished the reason or reasons for the discipline in writing and shall, subject to the provisions of Article 19, Personnel File, be provided the opportunity to comment in writing in their own defense.
B. When the Employer takes action under this Article which either the Employee or the Union believes is improper or unjustified, the Employee or the Union shall have the right to process a grievance through the grievance procedure as provided under Article 14, Grievance Procedure, hereunder.

ARTICLE 3 - MAINTENANCE OF RIGHTS AND BENEFITS

Except as modified herein, Employees shall retain all rights and benefits pertaining to their conditions of employment as contained in the departmental and civil service rules and regulations and statutes at the time of execution of this Agreement, but excluding matters which are not negotiable under Chapter 89, HRS.

ARTICLE 20 - PERSONAL RIGHTS AND REPRESENTATION

C. When grievances are filed against Employees of this unit for actions taken by them in the course of their employment and within the scope of their supervisory

D. and/or managerial duties and responsibilities, the Employer shall provide them with necessary staff support and representation. When such assistance is requested by the Employee and the Employer fails to furnish such assistance, the Employee will not be penalized for any improper action taken.

E. The Employer shall provide Employees with advice and assistance in the interpretation and administration of collective bargaining contracts or agreements covering their subordinates. Whenever Employees perform or carry out their assigned supervisory and/or managerial duties and responsibilities, based on such advice and assistance, the Employer agrees to provide full support to the Employees should conflict or grievances arise.

J. Bill of Rights

As used herein, the term "complaint" refers to an allegation against an Employee which is made by an individual who is not employed within the same division. Whenever such a complaint is filed, the following shall be applicable:

1. No Employee shall be required to sign a statement of complaint filed against her.

2. If the Employer pursues an investigation based on such complaint, the Employee shall be advised of the seriousness of the complaint. The Employee will be informed of the complaint and will be afforded an opportunity to respond to the complaint, and to furnish evidence in support of her case. The Employee shall have the right to be represented by the Union in presenting her case.

3. Before making a final decision, the Employer shall review and consider all available evidence and data, including factors supporting the Employee's position, whether or not she offers such factors in her own defense.

RELEVANT ..... POLICIES AND PROCEDURES

....., Policy and Procedure Manual Number: 04.250.003
Effective Date: 01/22/96
Subject: Use of Seclusion, and Bodily Restraint
Reference: DOJ, Chapter 11-175, JCA.HO,
Perspectives Nov/Dec 1992

PURPOSE: To ensure that all patients who are placed in physical or mechanical restraints, seclusion, or chemical restraints are monitored adequately by appropriate medical personnel and that no patient is restrained or secluded for a period greater that that necessary for the patient to no longer exhibit behaviors demonstrating an imminent threat of serious harm to self or others

POLICY: Bodily restraint, seclusion, or chemical restraints, are administered by a qualified professional and are never used for the convenience of the staff, for punishment, or in lieu of professionally developed treatment and/or training programs.

DEFINITIONS:

Bodily Restraints - Physical or mechanical devices used to restrict the free movement of a patient or the movement or normal function of any portion of the patient's body;

Chemical Restraints - Chemical substances used for the sole purpose of controlling the behavior of a patient, and not for treatment purposes.

Seclusion - Simultaneous confinement and isolation of the patient. Seclusion occurs whenever a patient is placed alone in an isolated room or enclosed space and the exit from the room is mechanically locked or any attempt by the patient to leave the room will be prevented by physical intervention from the staff. Seclusion also occurs when a patient is placed in an isolated room and confined in such a way that any attempt by the patient to exit the room will, or it is reasonably believed by the patient that it will,

result in the application of sanction, such as the loss of privileges.

EMPLOYER POSTION

Employer argues that Section 89-9(d), HRS, and Article 11 of the CBA permit Employer to discipline employees for just and proper cause. In order to understand just and proper cause it is helpful to review what is commonly known as the "seven tests of just cause." These tests are widely accepted, as noted in Anchorage_Hilton Hotel, 102 LA 55, 58 (Landau 1993).

> In the realm of collective bargaining, the meaning of just cause has been developed through decades of arbitral decisions. The most widely accepted and applied standard of just cause in labor arbitration was developed over 25 years ago and is commonly referred to as the "seven tests of just cause." See, Enterprise Wire Co., 46 LA 359 (Daugherty 1966).

This standard has been disseminated amongst all of the departments of the State of Hawaii. It has also been recognized by arbitrators in the State of Hawaii, including public sector arbitrations and arbitrations at ..... State of Hawaii, 109 LA 289 (Nauyokas 1997).

In addition, the test no longer requires a finding of "no just cause" if there is a "no" answer to any one of the seven tests. Hillhaven Corp., 91 LA 451 (McCurdy 1988).

Employer's contends that its actions meet all seven tests of just and proper cause. Employer explicitly used the seven tests of just and proper cause. In addition, a step-by-step review arrives at the same conclusion:

1. Did the Employer give the employee any forewarning of the possible disciplinary consequences of the employee's conduct? Answer: YES.

It is undisputed that the Grievant was made aware of the seriousness with which Employer viewed patient abuse and violation of the seclusion policy. Grievant himself acknowledges that policies and procedures mostly applying to nursing, such as pertaining to seclusion, are readily available at the nursing station. Moreover, Grievant testified at length concerning the specifics of the seclusion policy and procedures as well as the need for "one hundred percent compliance." Thus, Grievant was clearly informed of Employer's expectations, the means to carry out those expectations and the consequences of failure to meet these expectations.

2. Were Employer's rules reasonably related to the orderly, efficient and safe operation of the facility and the performance that Employer might properly expect of the employee? Answer: YES.

Clearly the very purpose of the ..... is to provide a safe and secure place for the patients and the staff. In addition, the very treatment of the patients in this type of facility depends on the scrupulous adherence to sound treatment principles, which includes minimization of restraint and isolation.

3 and 4. Did Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? Was the investigation conducted fairly and objectively?

Answer: YES.

The Grievant had the benefit of four investigations in this case. The first investigation was conducted by a professional investigator who is independent of Employer. Despite the apparent thoroughness of this investigation, the Hospital Administrator returned the investigation for additional inquiry. Then, after Grievant was permitted to submit additional material in response to the allegations, the Department Director ordered additional inquiry into a number of issues raised by Grievant. This second investigation resulted in a reduction of the proposed punishment from dismissal to suspension. This second investigation and the Director's action show that was not merely a superficial reconsideration and it clearly reflects a desire to be fair and the giving of the benefit of the doubt to Grievant.

The third investigation was conducted at the step 2 level where the disciplinary decision was reconfirmed. Finally, at the step 3 investigation, in response to the claims of the Grievant, new evidence was found that more than reconfirmed the Grievant's guilt. In fact the evidence obtained at this stage in the process begins to paint a picture of the Grievant using pressure to influence the statements of his co-workers. In addition, the pattern emerges that once the Grievant suspects that a witness or an investigator does not support Grievant, the Grievant attacks the professionalism and the credibility of the investigator or the witness.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged? Answer: YES.

The evidence against Grievant is substantial. The initial investigation had four staff members (....., ..., ..., and .....) stating that Grievant was blocking ....'s door. Grievant requested additional investigation at the pre-dismissal hearing and ..... confirmed with two of the staff that Grievant was blocking the door (..... and .....) . Grievant asked for an additional investigation at the step 2 and step 3 meetings. ..... not only confirmed with three of the staff (....., ... and .....) that Grievant was blocking .....' door with his foot, ...

found a fifth staff member (.....) who also confirmed that the Grievant was blocking the door. Moreover, this new witness was one the Grievant had presented as one who would support his position.

In summary, in addition to ..... and ....., four staff members have consistently stated that the Grievant was blocking the door. The Grievant questioned the credibility of only one of these staff members, ... However, Grievant solicited .....'s support purportedly knowing that ..... has a credibility problem.

Employer asserts that Grievant tried to portray ..... as having been led astray by ..... However, ... told both investigator ..... and ..... that she contacted ..... only because she was the Union steward. In addition, Grievant's claims that this investigation is the result of .....'s initiative are unsupported. Investigator ..... clearly established that the initiation of his investigation was the result of direct contact with .... flatly denied discussing the progress of his investigation with ..... Finally, Grievant's assertion that ..... was influenced by ..... is not supported by .....' written statement submitted by Grievant when he attacked .....

6. Has the Employer applied its rules, order, and penalties fairly and without discrimination to all employees? Answer: YES.

There is no evidence that the punishment given to the Grievant was disparate. The initial recommendation of dismissal included patient abuse which is considered the most serious offense that can be committed in a patient care environment. Clearly, the reduction in the Grievant's punishment, as determined by the Director, was proportionate to the reduction in the degree of patient abuse found to have been committed by the Grievant.

7. Was the degree of discipline administered by the Employer reasonably related to the seriousness of the employee's proven offenses and the record of the employee in his service with the Employer? Answer: YES.

Generally, an arbitrator should not substitute his own judgment as to the appropriate disciplinary action for that of Employer absent compelling evidence that Employer has abused its discretion. Whirlpool Corp., 58 LA 421, 430 (1972). Or, as more recently opined by arbitrator Kanner in Caro Center, 104 LA 1092 (1995):

> In my opinion, the bottom line followed by the majority of Arbitrators is that, where the discipline/discharge appears unreasonable in the light of all the facts, the Arbitrator has the authority to modify or vacate it. But I am also of the view that management's decision

> should not lightly be upset if within the broad parameters of reasonableness.

Employer argues that Grievant's misconduct is more than just blocking the door of a patient and thereby effecting an unauthorized seclusion. Grievant failed to report the incident and has continued to carry on a campaign of denial of his misconduct, accompanied by attacks on those co-workers conscientious enough to come forward and tell the truth. In fact, Grievant has extended his attacks to the investigator and against the person conducting the step 3 adjudication.

While Grievant should not necessarily be given greater punishment just because he "plead not guilty", his post seclusion/abuse conduct clearly reveals that he lacks remorse and refuses to accept personal responsibility. These factors weigh heavily against mitigation of the Grievant's punishment, despite his prior unblemished, albeit short, record.

Grievant was provided the opportunity to respond to the charges against him during the investigation. He was given the opportunity to appear at a pre-dismissal hearing where he was able to have his punishment reduced. Finally, Grievant has had the opportunity to contest his suspension at steps 2 and 3 of the grievance process prior to this arbitration.

Grievant was disciplined for just and proper cause. The Grievant has failed to rebut the evidence that Grievant improperly

blocked .....' door and effected an unauthorized seclusion and failed to properly report the incident.

For the foregoing reasons, the grievance should be denied and the suspension should be upheld.

UNION POSITION

Union asserts that the record reflects that Employer notified Grievant of his termination effective the close of business ....., finding, by investigative report from the Attorney General's office, that Grievant had (1) abused patient ....., (2) used unnecessary and excessive force to place her in seclusion in an unauthorized area; (3) failed to obtain a physicians order for seclusion; and (4) failed to complete the required documents in accordance with ..... policies and procedures.

The record also reflects that Employer claimed as a result of the pre-dismissal meeting of ....., that it had reservations and questions about the investigative report of the Attorney General's office. Subsequently, further investigation was conducted by the Director's office by ..... and ..... of DHRD which resulted in a reduction of the charges that formed the basis of the termination to (1) involuntarily secluding

patient ..... in an unauthorized area without physicians orders and (2) failing to complete required documents in accordance with hospital policy further resulting in a reduction of the disciplinary action from termination to a ten-day (10) suspension.

Employer contends that the 10 day suspension is justified based on the Attorney General Investigation and the follow up investigation by ..... and ..... and comports with the "just and proper cause" seven point test pursuant to Enterprise Wire Company, 46 LA 359, 362-365 (1966).

In its Pre-Arbitration Hearing Conference Statement, Union contended, that under the seven point test for just and proper cause enunciated by Arbitrator Carroll R. Daugherty in the seminal case of Enterprise Wire Company, 46 LA 359, 362-365 (1966), applied by Hawaii arbitrators since 1984, the ten day suspension of Grievant was without just and proper cause and a violation of Article 11 of the Unit 09 Agreement.

In particular Union suggest close scrutiny by the Arbitrator of the following five questions of the seven point just cause test will invalidate the Employer’s disciplinary action against Grievant. These five questions are briefly:

> 1. Whether the Employer made an attempt to discover whether the Grievant did, in fact, violate or disobey the seclusion policies and procedures?

2. Was the investigation conducted fairly?

3. Did the decision-maker have substantial evidence of whether the Grievant was actually guilty of what he was charged with?

4. Was the Employer's disciplinary action evenhanded or nondiscriminatory?

5. Was the degree of discipline excessive in this situation?

Union contends that there is a lack of substantial evidence justifying any disciplinary action and, based on Grievant's history of employment with the ....., the ten-day suspension is excessive if the arbitrator believes disciplinary action is appropriate.

As its remedy, Union request that: (1) the ten-day suspension should be rescinded, (2) compensation lost as a result of the ten-day suspension including, back pay, lost temporary assignment, and overtime Grievant would have received had he not been suspended, in order to be made whole, (3) that all derogatory material in any way related to this matter be expunged from Grievant's files, (4) that Employer ceases and desist form further violations of the Unit 09 Agreement, and (5) such other and further relief as the Arbitrator deems just and proper under the circumstances of this case.

Union argues that the parties, by and through their respective counsels, have stipulated that the issue is whether

the ten-day suspension of Grievant was for "just and proper cause" pursuant to Article 11 of the Unit 09 collective bargaining agreement.

Union asserts that the Unit 09 Agreement does not however, contain a definition of "just and proper cause". As a result the Arbitrator is allowed to fashion his own definition of "just and proper cause", within reason. Union respectfully suggest that any definition utilized by the Arbitrator consider and include the standard enunciated by Arbitrator Carroll R. Daugherty in Enterprise Wire Company, 46 LA 359, 362-365 (1966).

In Enterprising Wire Company, supra, Arbitrator Daugherty suggests a set of guidelines or criteria be employed in any given case to be determined whether the arbitrator should "substitute his judgement for that of the employer". (Elkouri & Elkouri, How Arbitration Works, page 666, 4th Edition (1985) The guidelines are seven (7) questions against which Employer's conduct must be measured. A single negative response to any of the seven-criterial questions invalidates Employer's disciplinary action. These criterial questions include the following:

1. Did the Employer give the Employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the Employee's conduct?

2. Was the Employer's rule reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) performances that the Employer might properly expect of the Employee?

3. Did the Employer, before administering discipline to an Employee, make an effort to discover whether the Employee did in fact violate or discharge a rule or order of the Employer?

4. Was the Employer's investigation conducted fairly and objectively?

5. Did the Employer obtain substantial evidence or proof that the Employee was guilty as charged?

6. Has the Employer applied its rules, orders and penalties evenhandedly and without discrimination to all Employees?

7. Was the degree of discipline administered by the Employer in this case reasonably related to (a) the seriousness of the Employee's proven offense and (b) the record of the Employee in his service with the Employer?

In the often quoted case of Grief Bros. Cooperage Corp., 42 LA 557 (1964) arbitrators, like Daugherty, have been confronted with union-management agreements that do not contain a definition of "just and proper cause". Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of "common law" definition thereof, entrenched now in Elkouri & Elkouri, How Arbitration Works, 4th Edition (1985). Union cites Hawaii cases in support of this argument.

Union argues that the documentary evidence establishes that Employer initially notified Grievant of his dismissal because it found Grievant to have (1) abused patient ....., (2) placed her in seclusion in an unauthorized area, (3) not obtained an order from the doctor on duty to place her in seclusion, and (4) failed to complete the required documents in accordance with hospital policy and procedures. These charges that form the basis of the Employer's disciplinary termination, were a result of an investigative report prepared by ..... The investigative report also included allegations of Grievant using "unnecessary and excessive force" to drag ..... into her room, where she was, it is alleged, secluded and restrained in violation of hospital policy. The investigative report also alluded to appearances of a conspiracy to cover-up patient .....'s abuse complaint against Grievant.

However, notwithstanding the investigation conducted by the attorney general's office (.....), Miike, expressed concerns that questioned the validity and basis of the conclusions made in the investigative report.

Specifically, Miike concluded that the investigator should have talked to all of the witnesses. Mikke testified: "that upon review the only person who seemed to say that she was dragged was the patient herself", "that the investigator is not to make

a judgement on when enough is enough and that he is an investigator and he must do a thorough investigation", "that the investigative person, individual, ..., may have attempted to place words in witnesses mouths", all leading to the overall concern of whether the investigation was fair.

As a result of his concerns, Miike, after the Pre-Dismissal meeting, assigned ..... to follow up on certain issues.

As a result of her follow up investigation and verbal report Miike rescinded Grievant's termination and issued a ten-day suspension instead because Miike did not think he could substantiate a dismissal for Grievant. Accordingly the ten-day suspension was issued because Grievant (1) involuntarily secluded patient ..... in an unauthorized area without obtaining an order from the doctor and (2) failed to complete the required documents in accordance with hospital policies and procedures.

Union argues that other than the flawed investigative report by ....., the record reflects no other formal investigative review or report to substantiate the ten-day suspension of Grievant. Utilizing the "just and proper cause" standard required by the Unit 09 Agreement, and as interpreted by Hawaii arbitrators, the facts of this case do not justify the ten-day suspension of Grievant. The oral and documentary

evidence compel the following responses to each of the seven (7) criterial questions required under Enterprise Wire Company:

1. Did the Employer give the Employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the Employee's conduct?

Under the first criterial question, Employer must establish, in carrying its burden of proof, that Grievant was provided notice of the possible or probable disciplinary consequences for violating the rule(s) or order(s) of the Employer Grievant is alleged to have violated.

The rule or order Grievant is alleged to have violated is the .....'s policy relating to the Use of Seclusion and Bodily Restraint.

Under the first criterial question, Employer must provide evidence that Grievant was provided notice of the possible disciplinary consequences for violating this policy. The record does not contain such notice to Grievant, either verbally or by document. The record does however, contain a copy of the prevailing Use of Seclusion and Bodily Restraint policy as Employer Exhibit F, with a convenient unidentified nor testified to hand-written statement on the bottom of the page 1 of Employer Exhibit F that portends to confirm that the "Policy is available on floor & ..... is familiar policy. However, Employer

failed to assert and prove at the arbitration of this case that it provided Grievant notice of the disciplinary consequences for violating the Use of Seclusion and Bodily Restraint policy. Familiarity with the policy is not disputed by Grievant However, the first criterial question does not seek confirmation of the existence of the policy, but whether Employer notified Grievant that violation of that policy would likely result in disciplinary action against him. Employer failed to produce such testimony.

Based on the foregoing, Union submits that the fair answer to the first criterial question is "NO". Employer did not give Grievant forewarning or foreknowledge of the possible or probable disciplinary consequences for his conduct.

2. Was the Employer’s rule reasonably related to (a) the orderly, efficient, and safe operation of the Employer’s business and (b) performances that the Employer might properly expect of the Employee?

Under the second criterial question, Employer must establish, under its burden of proof, that the rules, violated by Grievant and for which he was suspended, reasonably relate to the orderly, efficient and safe operation of Employer's business and to performances Employer can expect of Grievant.

Union agrees that the use of Seclusion and Restraint Policy of the ..... relates to the (a) orderly,

efficient, and safe operation of the ..... and to the (b) performances that the Employer might properly expect of the Employee. This stipulation is totally independent of any obligation Employer carries to establish a compelling affirmative response to this criterial question. In that respect, Union submits that the proper response to this criterial question, based on the failure of Employer to produce evidence to establish to the contrary is that a Negative response. However, in view of the fact that Grievant knows his duties and responsibilities well enough to be licensed, and have a career with no prior incidents or failures resulting in disciplinary action, Union and Grievant submit that the fair response to the second criterial question is "YES". The Employer's rule, the Use of Seclusion and Restraint policy, is related to the (a) orderly, efficient, and safe operation of the ....., and to the (b) performances that the Employer might properly expect of the Employee.

3. Did the Employer, before administering discipline to an Employee, make an effort to discover whether the Employee did in fact violate or disobey a rule or order of the Employer?

This critical question simply asks whether Employer made an attempt to discover whether Grievant did in fact violate or

disobey the use of Seclusion and Bodily Restraint policy as alleged.

The record reflects that an investigation was conducted by ....., Investigator IV, Department of the Attorney General, State of Hawaii.

From the foregoing record it appears that the response to the third criterial question is "YES". Employer did make an effort to discover whether the Grievant did in fact violate the Use of Seclusion and Bodily Restraint Policy. However, whether this attempt was fair, objective, complete and thorough, and in compliance with "due process" and the "just and proper cause" standard are questions raised and answered in subsequent criterial questions.

4. Was the Employer's Investigation conducted fairly and objectively?

This criterial factor questions the fairness and objectivity of Employer's investigation into whether Grievant did in fact violate the Use of Seclusion and Bodily Restraint policy.

The record reflects that on ....., Employer attempted to terminate Grievant for (1) patient abuse, (2) placing patient in seclusion in an unauthorized are, (3) failure to obtain a doctor’s order for seclusion, and (4) failure to

complete required documents in accordance with hospital policy. However, upon review of the investigative report and its flaws, Employer recognized that it could not substantiate the termination, and chose instead to rescind the termination and simultaneously issue Grievant a ten-day suspension for (1) involuntarily secluding patient ..... in an unauthorized area without obtaining an order from the doctor and (2) failing to complete the required documents in accordance with hospital policy. The record reflects that when questioned about the reason for the change in disciplinary action from termination to suspension, Miike, stated that he was concerned that not all witnesses were questioned, inconsistent statements among the witnesses, and he concluded that the investigator should have talked to all the witnesses.

The determining factor in the reduction of the disciplinary action from termination to ten-day suspension was that the dragging accusation was only supported by the patient herself.

Finally, according to Miike, his concern was about the fairness of the investigation.

Other failures of the investigation is that the investigator for all his experience has made a determination of having a preponderance of the evidence in support of the conclusions he makes in the investigative report without having

all the evidence. How he makes this conclusion without all the evidence needs no further discussion. It is ludicrous!

Miike made a telling statement about the investigation and .....'s view of the evidence when he said:

> "That he (.....) is not to make a judgement about when enough (evidence) is enough and that he's an investigator and he must do a thorough investigation".

Other failures of the .....'s investigation include but are not limited to the following:

1. The report does not cite, make reference to or attach the Policy of the .... concluded Grievant violated. There is no discussion of the record of established facts to support a finding Grievant violated the policy not identified in ..... investigative report.
2. The report fails to interview all possible witnesses and does not recite, make reference to any identification of all the possible witnesses. There is no daily assignment log identifying those present on the shift that may have seen all or a portion of the events of ......
3. The report does not contain any corroborating facts that tend to support or not support any of the witness's statements. ..... was alleged to have seen the "dragging" portion of the evening of ..... Yet

no one was able to verify that ..... was physically able to see the events or not from her point of view. No line of sight was determined. Not even the residential room ..... was supposedly sitting in the door in was made a part of the investigative report.

4. There is no map of the female dorm rooms identifying by established documentation which room ..... was in and ..... was in. No mention is made of the floor plan of each room, and that it shares a bathroom with another room. No one entered any of the residential rooms to determine if there was a common bathroom with the adjacent room. No one checked if someone could actually walk from one room to another via the bathroom, whether it was locked or not.
5. The report concludes the presence of a conspiracy, and the use of "unnecessary excessive force" from critical witnesses that form the basis of the alleged charges against Grievant, which are later dropped by the Director of health because of the lack of substantiation.
6. The witnesses relied on by the Investigator to conclude physical abuse, are generally dismissed because of the lack of corroborating evidence.

The bottom line on the investigative report is that it is a poor excuse of a proper investigative report. The excuse that the U.S. Department of Justice required all reports to be completed faster is of no consequence.

By Employer's own admissions during the arbitration hearing, the investigative report was incomplete. The problem is that the reduction in disciplinary action from termination to a ten-day suspension does not rectify the problems with the investigation, nor make up for its incompleteness or its inability to paint a complete picture of the events as they existed on the evening of ..... In short, a reduction in disciplinary action does not validate the flawed investigative report.

And the follow-up report by ..... does not constitute a new and separate report, nor does it make up for the incompleteness of the ..... investigative report. All .....'s follow-up activities do is confirm Miike's suspicion of the lack of justification for the termination action against Grievant. Yazawa's follow-up activities do not constitute a report that substantiates the ten-day suspension.

Based on the foregoing analysis of the facts in this case Union submits that the compelling response to the fourth

criterial question is "NO". Employer's investigation was not fair or objective.

5. Did the Employer Obtain Substantial Evidence or Proof That The Employee Was Guilty As Charged?

This critical question asks whether Employer had "Substantial evidence or proof" that Grievant was guilty of violating the Seclusion and Bodily Restraint Policy of the ..... on ..... with respect to ......

Under Enterprise Wire Company, 46 LA 359, (1966), the fifth criterial question asks, similarly, "At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?" The inquiry according to Arbitrator Daugherty includes a review of the following notes:

> Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.
>
> Note 2: The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.
>
> Note 3: When the testimony of opposing at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

The record reflects that Employer had the following evidence or proof that Grievant violated the ..... Policy on Use of Seclusion and Bodily Restraint Policy to justify the ten-day suspension:

1. The ..... Investigative Report (.....) dated ......

This investigative report attempts to substantiate conclusions of Patient Abuse/ Neglect, conspiracy to cover-up patient abuse, use of unnecessary excessive force and the failure to obtain physicians order for seclusion. The report substantiates these conclusions with the testimony of four (4) witnesses ....., ..., ... and .... is the only witness who appears to have seen Grievant seclude and restrain patient ..... Her statement to ..... however, is inconsistent to written statement she signed on November 28, 1997, along with nine (9) other individuals, disproving seclusion and restraint. ..... also had a telephone discussion with ..... on ..... in which she also confirmed and denied certain prior statements attributed to her by ..... And again on ....., ... wrote and signed her own individual statement about the incident of ..... and the subsequent events that transpired since that date.

The upshot of ..... various testimonies is that she is a schizophrenic witness, who says what she needs to say for the person she is speaking with. Unreliable, to say the least of the Investigative Reports primary witness.

....., is the individual who apparently witnessed the "dragging" allegation made by the patient. Employer dismissed this allegation. ..... does not assist this witness in anyway by describing the room that ..... or ..... were in at the time of the events of ..... occurred. Nor does ..... describe the room ..... was supposed to have resided in. And he did not see for himself if what ..... claimed she could physically see. And neither did ..... nor ..... No one verified the line of sight ..... claimed she had.

The dismissing of the .....'s statements of "dragging" was one of the smartest decisions this writer has ever seen Employer do. .....' testimony needs no further review.

..... is said to have witnessed Grievant grabbing both of .....'s arms and forcefully placed her in her room and blocked the door with his feet, forced ..... back into her room and prevented her from exiting her room for 20 to 30 minutes.

On ....., ... states that she did not see patient abuse. She indicates that patient ..... walked to her room. But did not mention ..... was being forcefully placed in her room.

She does say that the investigator tried to put words into her mouth.

On November 24, 1997, ... signed a written statement with nine others attesting to among other things, there was no abuse or seclusion or restraint.

On November 25, 1997, in a telephone conversation with ....., ... stated that she assumed that he (Grievant) put his foot at the bottom of the door because his hands were not on the door, and that ... someone must have held the door ... Grievant's foot may have been there.

.....'s total statements do not support anything resembling seclusion or restraint or abuse as concluded by the investigator and charged by the Employer.

..... is said to have witnessed Grievant blocking .....'s door with his foot, while ..... had one arm and leg sticking out the door. However, on November 25, 1997, ... signs a written statement with nine (9) other persons attesting to the fact that there was no seclusion, abuse or restraint of .... statement is further questioned by the fact that there is testimony that he loves to get RN's into trouble and he has a credibility problem.

In summary, neither the combination of all four Employer witnesses nor any one of them singularly makes an

unequivocal statement of guilt of Grievant of anything that is not ultimately made inconsistent by a subsequent statement. This is the sum total of Employer's evidence and justification for a ten-day suspension.

Furthermore the ..... definition of seclusion is not met under the facts established in this case. In particular ..... was not secluded since the record reflects that patients are able to walk from their room through the bathroom to the adjoining room and exit that way. As shown during the walk-through of ..... it is impossible to be locked in a room with an access to a shared bathroom. If there was no seclusion, then, according to Miike, there would be no need to complete the required documents.

In total, Employer's evidence does not amount to substantial evidence it must have under criterial question number 5. In light of the mountain of contradictory evidence offered by Grievant at many steps of this grievance, the little evidence Employer has amassed in its investigative report or in follow up investigations, amounts to the flimsiest of threads. The evidence is so thin it is anorexic.

Overall the evidence in this case lacks credibility, lacks corroboration, lacks consistency, and does not meet the "Substantial evidence" test. Employer’s decision to reduce the

disciplinary action from termination to a ten-day suspension attests to the lack of evidence in this case. However, a reduction in disciplinary action from termination to a ten-day suspension does not in and of itself render valid the lack of substantial evidence that is required under the fifth criterial question. Employer is mistaken that a reduction in the disciplinary action satisfies the lack of evidence requirements under Enterprise Wire Company. It is this kind of Employer thinking that compels arbitration.

Based on the foregoing, Union submits that the compelling response to the fifth criterial question is "NO" Employer did not obtain substantial evidence or proof that the Grievant was guilty as charged.

6. Has the Employer Applied its Rules, Orders and Penalties Evenhandedly and Without Discrimination to All Employees?

This criterial question asks whether Employer applied its rules, orders and penalties evenhandedly and without discrimination to all employees.

Union submits that the elementary investigation conducted by Employer, the failure of it to provide a factual basis for determining Grievant’s guilt of all alleged charges, and the lack of evidence advanced by Employer in its case in chief, must

be viewed in a light favorable to Grievant, that no conclusion can be made about the non-discriminatory manner in which the Employer applies its rules, orders and penalties, all lend truth to the conclusion that a negative response to this criterial question is compelling. Employer, without affirmative facts cannot be assumed to apply its rules, orders and penalties evenhandedly and without discrimination to all employees.

7. Was the Degree of Discipline Administered By The Employer In This Case Reasonably Related to (a) The Seriousness of the Employee's Proven Offense And (b) the Record of the Employee in his Service With the Employer?

This criterial question asks whether the discipline administered by Employer (ten-day suspension) in this case reasonably relate to (a) the seriousness of Grievant's proven offense and (b) the Grievant's employment record with Employer.

The record, from the ..... Investigative Report, to the follow-up telephone conversations, reported notes, submitted group statements, individual statements and the testimony at the arbitration hearing held herein, does not support a finding that Employer had substantial evidence to support the guilt of Grievant for seclusion and failing to complete the necessary documents in violation of ......

The record supports the exemplary record of Grievant as performing the duties and responsibilities with satisfaction and without prior incidents of patient abuse, seclusion, neglect, or failing to complete necessary documentation pursuant to ..... policy.

Based on Grievant's employment record and the lack of substantial evidence to support a finding of Grievant's guilt of secluding patient ..... and failing to complete the necessary hospital documents, Union and Grievant submit that the compelling response to the seventh criterial question is "NO". The degree of discipline administered by Employer in this case is not reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with Employer.

A review of the responses to the seven criterial questions reflects two affirmative responses (Criterial questions 2 & 3) and five negative responses (Criterial questions 1,4, 5, 6, & 7). Pursuant to Enterprise Wire Company, supra, one negative response is sufficient to invalidate the Employer’s action, and sustain the grievance. In this case there are five (5) negative responses.

It is undisputed that initially Employer attempted to terminate Grievant because it found, by virtue of only the .....

Investigative Report, Grievant to have (1) abused patient ....., (2) placed her in seclusion in an unauthorized area, (3) not obtained an order from the doctor on duty to place her in seclusion, and (4) failed to complete the required documents in accordance with hospital policy and procedures.

It is further undisputed that not until, and after a meeting between Union, Grievant and designates of Employer, and after Employer's own follow-up did Employer evaluate the evidence and conclude that it did not have justification for the termination. However, without further confirmation or corroboration of the facts, Employer erroneously believed that the same set for failures in evidence did amount to justification of a ten-day suspension for (1) involuntarily secluding patient ..... in an unauthorized area without obtaining an order from the doctor and (2) failing to complete the required documents in accordance with hospital policies and procedures.

The Enterprise Wire Company, seven point criterial questions has established that the Employer lacked substantial evidence to find the Grievant guilty of anything, and particularly not guilty of seclusion by definition of the ......

Based on the foregoing, the lack of solid, substantial evidence confirming documentation, corroborating the facts and charges against Grievant, the mountain of inconsistent witness statements, a very weak investigative report, Employer has failed to carry its significant burden of proof in order to sustain the ten-day suspension of Grievant in this case.

Union submits that the record compels the Arbitrator to rescind the ten-day suspension of Grievant and award him all back-pay, benefits of contract and law to make him whole, including but not limited to an award for lost-overtime and temporary assignment opportunities during the suspension and during the time he was reassigned to the nursing office.

Further the Arbitrator should order expunged from Grievant's personnel file and other files, any and all derogatory and related material from this grievance and arbitration, including the ..... Investigative Report.

Finally, the Arbitrator should award the Grievant and Union, such other and further relief the Arbitrator believes is fair and equitable under the circumstances of this case.

DECISION AND AWARD

After carefully reviewing the testimony and evidence presented at the hearings and reviewing the weil-written briefs

submitted by James E. Halvorson, Esq., for Employer and Peter Liholiho Trask, Esq. for Union, the Arbitrator makes the following findings. I first must note that I do not feel compelled to address every single argument set forth by these able advocates. This does not mean I have not read and reread the record and the briefs and carefully considered all the arguments. Rather, I choose to speak only to those elements that have a significant impact on my decision making process and although considered, I will not comment on those arguments I find superfluous, redundant, or rendered moot by my final decision.

Union and Employer have applied Arbitrator Daugherty's Seven-Step Test to determine whether there was just and proper cause to discipline Grievant. An answer of "no" to any of the Daugherty's questions would indicate that there is not just and proper cause. Employer argued that "the test no longer requires a finding of "no just cause" if there is a "no" answer to any one of the seven tests. Hillhaven Corp., 91 LA 45l (McCurdy 1988)". In this Arbitrator's opinion, the opinion of one Arbitrator does little to persuade this Arbitrator from requiring a "yes" answer to each of the seven questions articulated by Daugherty in proving just cause.

1. Did the Employer give the Employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the Employee's conduct?

The Arbitrator finds the answer to this question to be "yes". Grievant was a licensed Registered Professional Nurse III. The Arbitrator would expect a trained professional to be aware of all rules and policies involving patient care. Any RN must know that patient abuse is a serious matter that could if proven jeopardize a RN's career. As Employer pointed out in their argument:

Grievant himself acknowledges that policies and procedures mostly applying to nursing, such as pertaining to seclusion, are readily available at the nursing station. Moreover, Grievant testified at length concerning the specifics of the seclusion policy and procedures as well as the need for "one hundred percent compliance." Thus, Grievant was clearly informed of Employer's expectations, the means to carry out those expectations and the consequences of failure to meet these expectations.

2. Was the Employer’s rule reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) performances that the Employer might properly expect of the Employee?

There is no dispute that the Seclusion and Restraint Policy of the ..... relates to the (a) orderly, efficient, and safe operation of the ..... and to the (b) performance that Employer might properly expect of an employee. Therefore the answer to this question is "yes".

3. Did the Employer, before administering discipline to an Employee, make an effort to discover whether the Employee did in fact violate or disobey a rule or order of the Employer?

Union does not dispute that Employer made an effort to discover whether Grievant did in fact violate or disobey a rule or order of Employer. As Employer pointed out Grievant had the benefit of four investigations. The answer to this question is "yes".

4. Was the Employer's investigation conducted fairly and objectively?

This case poses a dilemma for the Department. Federal scrutiny in the area of patient abuse and the requirements of just cause contained in the collective bargaining agreement between the parties. The impact of a finding by Employer of patient abuse demands disciplinary action including the discharge of an Employee for the first offense. Because of this, Employer must be required to conduct a thorough investigation. This requirement is heightened because a RNs career is at stake. The State's duty to protect patients must be balanced against its obligation to conduct a complete investigation. A complete investigation requires that all possible witnesses must be interviewed. In regards to the investigator's duty to interview

all witnesses Miike testified that: "That he (investigator) is not to make a judgement about when enough is enough".

In this case the investigator was not part of the Department's staff. The ..... is monitored by the United States Department of Justice to ensure compliance with contempt orders as a result of a class action suit initiated in 1991. Pursuant to this monitoring, the Investigations Division of the State Department of the Attorney General assigned investigators to ..... whose primary duty is to investigate allegations of patient abuse. ....., was the investigator assigned in this case to conduct the investigation of Grievant’s alleged patient abuse. He testified that he had an office at the hospital and would spend at least three of his five-day workweek at the hospital.

It was clear to the Arbitrator that ..... lacked the necessary knowledge and training in conducting an investigation to satisfy the requirements of just and proper cause as contained in the agreement. He testified that the burden of proof in this case was preponderance of evidence. He defined preponderance as fifty percent plus one. In this Arbitrator's experience, attorneys, labor relations personnel and business agents have argued at hearings and through post hearing briefs what standard of proof should be applied in any given case.

Beyond a reasonable doubt, clear and convincing and preponderance of evidence are the standards that are typically argued by the parties. The Arbitrator decides what standard to apply. An investigator clearly over steps his bounds when he determines what standard to apply and conducts his investigation to satisfy that standard.

The ..... investigation can in no stretch of the imagination be considered fair and objective.

The ..... investigation concluded that Grievant:

"Charge Nurse ....., and Patient Right's Advocate ..... **conspired** to cover-up patient .....'s abuse complaint against ..... when: 1) ..... and ..... both denied the incident involving .....',s complaint had ever occurred; 2) Multiple staff witnessed and verbally confirmed ..... used unnecessary excessive force when he "**dragged" .....** into her room and secluded her there against her will without obtaining a Physician's Order; 3) Multiple staff confirmed ..... was present and observed ..... prevent ..... from exiting her room when he blocked the door with his foot; 4) In the Progress Notes ..... and ..... failed to correctly document this incident as it had actually occurred and they failed to file the required Patient Event Report;) It appears ..... intentionally failed to process .....'s Patient Grievance Form through the proper channels as required which would have resulted in an investigation. Patient Abuse - Neglect was substantiated.(emphasis added)

Conspiracy to cover up patient abuse? How in the world did ..... conclude that there was a cover up involving the patient rights advocate? He assumed that ..... filed a grievance and that ....., the very person responsible for patient's rights destroyed the grievance form. This is a serious charge. What is lacking is proof.

The evidence ..... obtained did not support his conclusion that Grievant "dragged" ..... into her room. The Department's investigations subsequent to .....'s investigations and the pre dismissal hearing concluded that there was insufficient evidence to support this claim. The Department discovered through its investigation that ..... did not make an attempt to interview all available witnesses.

The mere fact that an outside agency (Attorney Generals Office) using professional investigators conducted the investigation does not in itself add more weight and credibility to .....s findings and conclusions. As a professional investigator, the Arbitrator will hold him to a much higher standard than it would hold a supervisor or other member of management charged with conducting an investigation. Any investigator and especially a professional investigator can not wear blinders in his attempts to substantiate allegations of patient abuse. There is another side of the equation that can not be ignored. That is the right of the accused to be vindicated by the results of a fair, objective, complete and impartial investigation. The investigator must establish more than probable cause. There is no grand jury to determine whether an indictment should be issued. In the labor arena the results of an investigation must prove that Grievant committed the acts

that warrant any form of discipline. The grievance process is the Grievant’s only mechanism to prove his innocence. It is his only opportunity to challenge the investigation. In this case the grievance process worked.

The Department after conducting their own investigation found in following up on information provided by Grievant that there was insufficient evidence to support the discharge of Grievant. Employer was only able to substantiate that Grievant had prevented ..... from exiting her room when he blocked the door with his foot.

The Arbitrator finds that Employer's subsequent investigations conducted by ..... and ..... to have been fair and objective. They followed up on the additional material and information provided by Grievant and as a consequence Grievant's discharge was reduced to a ten-day suspension. These additional materials included statements of support for the Grievant signed by several of the staff witnesses who had made prior statements against him.

..... conducted additional interviews of six of the witnesses and she confirmed the following staff members saw the Grievant with his foot against .....'s door: ....., ..., ..., and ..... Two of these staff members confirmed their

initial statements against Grievant even though Grievant had obtained their signatures of support.

The Arbitrator can give no weight to the written statements of co-workers and subordinants obtained by Grievant. It was obvious to the Arbitrator that their inconsistent statements were the result of Grievant using pressure to influence their statements. Grievant, in the Arbitrator's opinion crossed the line in his efforts to prove his innocence. By doing so he compromised his own credibility.

The answer to this question is "no" in regards to the ..... investigation and "yes" to the ..... and ..... investigations.

5. Did the Employer obtain substantial evidence or proof that the Employee was guilty as charged?

Union argued:

Under Enterprise Wire Company, 46 LA 359, (1966), the fifth criterial question asks, similarly, "At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?" The inquiry according to Arbitrator Daugherty includes a review of the following notes:

> Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.
>
> Note 2: The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.
>
> Note 3: When the testimony of opposing at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the

> contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

The Arbitrator has not loss focus of the fact that this is not a discharge case. It is a case where Grievant was suspended for ten-days. The ten-day suspension was issued because Grievant (1) involuntarily secluded patient ..... in an unauthorized area without obtaining an order from the doctor and (2) failed to complete the required documents in accordance with hospital policies and procedures. Employer argued:

> The evidence against Grievant is substantial. The initial investigation had four staff members (....., ..., ..., and .....) stating that Grievant was blocking .....'s door. Grievant requested additional investigation at the pre-dismissal hearing and ..... confirmed with two of the staff that Grievant was blocking the door (..... and .....). Grievant asked for an additional investigation at the step 2 and step 3 meetings. ..... not only confirmed with three of the staff (....., ... and .....) that Grievant was blocking ..... door with his foot, ... found a fifth staff member (.....) who also confirmed that the Grievant was blocking the door. Moreover, this new witness was one the Grievant had presented as one who would support his position.

The problem with this argument as Union points out is Employer's reliance on the ..... investigation. The Arbitrator has ruled that his investigation was not fair and objective. That does not mean however that Employer through the ..... and ..... investigations failed to obtain substantial evidence or proof that Grievant was guilty as charged. They satisfied Daugherty’s notes one, two and three raised by Union above. The evidence

they obtained was substantial, they actively sought out witnesses and the Arbitrator believes they had more than reasonable grounds for believing the statements given by the witnesses they interviewed. Giving no weight to the ..... investigation the Arbitrator finds the answer to this question is "yes".

Union argued that:

Furthermore the ..... definition of seclusion is not met under the facts established in this case. In particular ..... was not secluded since the record reflects that patients are able to walk from their room through the bathroom to the adjoining room and exit that way. As shown during the walk-through of ..... it is impossible to be locked in a room with an access to a shared bathroom. If there was no seclusion, then, according to Miike, there would be no need to complete the required documents.

Union can not assume that ..... had the capacity to exit her room from the adjoining room. No evidence was produced to show that ..... or any patient entered or exited their rooms through the adjoining room. The Arbitrator finds based on the evidence that Grievant did seclude ..... and failed to file the appropriate reports.

6. Has the Employer applied its rules, orders, and penalties evenhandedly and without discrimination to all Employees?

This argument usually entails allegations of disparate treatment made by Union. There is no evidence in the record that

would support this argument. The answer to this question is "yes".

7. Was the degree of discipline administered by the Employer in this case reasonably related to (a) the seriousness of the Employee's proven offense and (b) the record of the Employee in his service with the Employer?

The Arbitrator finds that Employer's action in reassigning Grievant or any employee where there are allegations of patient abuse is necessary to protect the patient and the Hospital. Depending on the severity of the allegation this action should be taken immediately upon discovery and substantiation of an allegation of patient abuse. What it is troubling to the Arbitrator is that the incidents that lead to the dismissal and reduction to a ten-day suspension occurred on May 19, 1997 and were brought to the attention of Employer on May 21, 1997. The reassignment did not occur until June 26, 1997 or July 31, 1997. This is despite the federal mandate to expeditiously conduct investigations of alleged patient abuse.

Employer argued and the Arbitrator would agree that:

Generally, an arbitrator should not substitute his own judgment as to the appropriate disciplinary action for that of Employer absent compelling evidence that Employer has abused its discretion. Whirlpool Corp., 58 LA 421, 430 (1972). Or, as more recently opined by arbitrator Kanner in Caro Center, 104 LA 1092 (1995):

> In my opinion, the bottom line followed by the majority of Arbitrators is that, where the discipline/discharge appears unreasonable in the light of all the facts, the Arbitrator has the authority to modify or vacate it. But I am also of the view that management's decision should not lightly be upset if within the broad parameters of reasonableness.

Employer's initial reliance on the ..... investigation and decision to terminate Grievant can not be ignored. Employer must be held accountable for its actions. Investigators must have a working knowledge of the collective bargaining agreement and more importantly an understanding of the concept of just cause. Although the Arbitrator finds that Employer's subsequent investigation conducted by individuals knowledgeable in the labor relations arena established that Grievant secluded ..... by placing his foot against her door the ten-day suspension shall be reduced to a written warning. Employer's decision to suspend Grievant is not found to be within the "broad parameters of reasonableness".

AWARD

For the reasons stated above, the grievance filed by the Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO on behalf of Grievant ....., is sustained in part and denied in part. The ten-day suspension shall be reduced to a written warning. Grievant shall be awarded ten days back pay and

attendant benefits. These benefits do not include lost compensation for temporary assignment and overtime Grievant would have received had he not been reassigned and subsequently suspended. The Arbitrator will retain jurisdiction of this case for sixty days for the sole purpose of resolving any questions involving the implementation of this award.

DATED: February 25, 1999, Honolulu, Hawaii

Jim Nicholson
Arbitrator

Subscribed and sworn to before me
This 25th day of February 1999,

My Commission expires on: 7/11/2001
Cheryl C. Castro